GABRIEL ENERGY CORP.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 86-1422 Decided October 17, 1988

Appeal from a decision of Administrative Law Judge Frederick A. Miller approving Cessation Order No. 85-81-225-01. NX 5-101-R.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Board of Land Appeals--Estoppel

Where an operator begins excavation of coal on Federal lands without a Federal permit, negotiates with OSMRE to suspend enforcement action pending litigation in Federal court of the need for a Federal permit, and ceases operations in reliance upon the agreement, OSMRE is bound by the terms of the agreement made with the operator and may not issue a notice of violation for conditions created by the agreement itself.

APPEARANCES: Doug Arnett, President Gabriel Energy Corporation, Lexington, Kentucky, for appellant; R. Anthony Welch, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

In December 1980, Gabriel Energy Corporation (Gabriel) began mining operations pursuant to a coal mining permit issued by the State of Kentucky on lands in the Daniel Boone National Forest owned by the United States and administered by the United States Forest Service. The rights to the coal located on the Federal land are owned privately. Gabriel's preliminary work at the permit location consisted of an excavation for a deep underground mine at the minesite (Tr. 62). Soon after starting to mine on the Federal land, Gabriel learned that the land's surface was Federally owned and that the Office of Surface Mining Reclamation and Enforcement (OSMRE) believed a Federal permit was required before mining could be allowed and that Gabriel's state permit was inadequate authority for the mining activity undertaken.

Initial notice of this circumstance was furnished to Gabriel by a letter dated January 8, 1981, from David Short, OSMRE Regional Director, which explained, referring to another surface coal mining operation being conducted by Gabriel, that operations on Federal lands, even where the minerals were

privately-owned, could not be conducted without a Federal permit, and that a permit to mine forest lands could only be granted under limited circumstances. Having learned of OSMRE's position concerning mining on Federal lands, it is undisputed that Gabriel then

> took the initiative and notified OSM of the similarity between its active operation and the proposed operation referred to in Mr. Short's letter. OSM's response was that a federal permit would be required at this mine site just the same as for the one referred to in Mr. Short's letter. Gabriel Energy immediately and voluntarily stopped all of its coal mining operations and arranged for a meeting with OSM. The meeting was held at OSM's regional office in Knoxville on January 20, 1981. Representing OSM at the meeting were David Short, Regional Director, and J.T. Begley, Regional Solicitor, and Doug Arnett represented Gabriel Energy.

(Gabriel Brief at 15).

The result of the Knoxville meeting between Short and Arnett was memorialized by a letter from Short to Arnett dated January 23, 1981, which stated, in part:

> Your discontinuing the operation and stabilizing the mine site pending the determination of the issues involved and your all-around candor and good faith are both commendable and very much appreciated. You may rest assured that I and my staff look forward to providing you with whatever assistance you require as you work toward resolving these matters.

(Gabriel Brief, Exh. A-6).

Gabriel immediately ceased mining operations and commenced a declaratory judgment action in the United States District Court for the Eastern District of Kentucky seeking a determination that the company was entitled to mine the privately-owned coal lying beneath the Federal lands covered by its state permit without a Federal permit. The United States District Court rejected Gabriel's claim for relief and appeal was taken to the Sixth Circuit Court of Appeals.

On May 8, 1984, while the Federal litigation was still pending, Notice of Violation (NOV) No. 84-81-40-5 was issued to Gabriel charging five violations of the Surface Coal Mining and Reclamation Act of 1977 (SMCRA), 30 U.S.C. || 1201-1328 (1982). These five violations, which were alleged to have occurred on Gabriel's mining operation on National forest lands, consisted of failure to backfill and grade to eliminate all highwalls, spoil piles, and depressions (Violation No. 1), failure to properly construct hollow fill No. 1 (Violation No. 2), failure to construct and maintain a road pursuant to the state permit (Violation No. 3), failure to monitor surface and ground water (Violation No. 4), and failure to maintain a mine identification sign (Violation No. 5). Gabriel was <u>not</u> charged with failure to obtain a Federal permit before commencing mining.

On January 29, 1985, the United States Court of Appeals for the Sixth Circuit rejected Gabriel's claim for relief, affirming the District Court. Thereafter, the United States Supreme Court rejected a petition for certiorari filed by Gabriel. Ramex Mining Corp. v. Watt, 753 F.2d 521 (1985), cert. denied, __ U.S. __, 106 S. Ct. 271 (1985).

On May 1, 1985, Cessation Order No. 85-81-225-01 was issued to Gabriel for failure to abate the five violations of SMCRA previously noticed. Following hearing before Administrative Law Judge Frederick A. Miller, a decision sustaining the validity of the cessation order issued, in which Judge Miller found that the validity of the cessation order was the "only legitimate issue presented by this case" (Decision at 2). Judge Miller then went on to rule that OSMRE had carried its burden of presenting a prima facie case when it presented testimony by its inspector concerning the condition of the minesite establishing the existence and continuance of each violation contained in the NOV issued to Gabriel. In finding that the cessation order was properly issued to Gabriel, the Administrative Law Judge rejected four affirmative defenses raised by Gabriel. 1/ Gabriel presented no evidence concerning the five violations of SMCRA alleged by OSMRE in the NOV. Reiterating before us the position taken before the Administrative Law Judge, Gabriel argues that it was error to reject three of the affirmative defenses which it raised before Judge Miller. We first consider Gabriel's final argument, which urges that the 1984 NOV and subsequent cessation order should be vacated because they were issued in violation of Gabriel's agreement with OSMRE.

Gabriel argues that OSMRE should be estopped from issuing the cessation order under review by the prior agreement reached between OSMRE and Gabriel. This agreement was observed by both parties until May 8, 1984, according to Gabriel, when OSMRE breached the agreement by first issuing an NOV for five violations arising from the execution of the agreement with OSMRE. Appellant argues that OSMRE subsequently acknowledged the efficacy of its agreement, by issuing a modified NOV on May 21, 1984, which extended the time for abatement of the NOV until a decision could be reached on the Federal permit issue raised before the Sixth Circuit Court. Gabriel argues that the existence of the agreement with OSMRE is corroborated by the May 21 modification of the NOV to permit completion of the Federal litigation, since the modification cannot be otherwise explained.

OSMRE takes the position that the existence of any agreement to defer action pending resolution of Gabriel's claims of valid existing right to mine is "problematic" at best, and that if there was any accommodation between the parties it was limited to an agreement to be bound by the final

1/ Gabriel's brief on appeal takes exception to the manner in which Judge Miller characterized the corporation's arguments, emphasizing that there were four arguments raised by Gabriel, the most significant of which was seen to be the question of the denial by OSMRE of Gabriel's request for an informal hearing. Although the Administrative Law Judge analyzed the case before him differently than does Gabriel, his decision, nonetheless, discusses all the issues raised by Gabriel.

determination reached in the litigation then before the Sixth Circuit Court. OSMRE argues that the terms and duration of the argument are disputed, and that there can be said to be no agreement under such a circumstance, since it is clear there was never a meeting of the minds of the parties concerning the terms of the agreement. OSMRE also argues that the cited violations at the minesite constitute undue damage to the public interest, thus preventing any such agreement as alleged. The agency also contends that, subsequent to the issuance of the NOV to Gabriel, the company again entered into negotiations with OSMRE which resulted in a modified agreement memorialized by the modified NOV which extended the abatement time until the end of the litigation before the Sixth Circuit Court.

Gabriel answers these arguments with a complaint that the Administrative Law Judge neglected to rule on the issue raised by the agreement between Gabriel and OSMRE. On appeal, Gabriel demands that the agreement of January 20, 1981, be enforced, and that the cessation order and the underlying NOV both be vacated, because they were issued in violation of the agreement of the parties which Gabriel has observed.

Gabriel argues that the estoppel argument which it makes before us was not considered in the Administrative Law Judge's decision. This position, however, is not entirely supported by the record, which indicates that the Administrative Law Judge implicitly rejected the estoppel argument when he found that OSMRE had awaited the judgment of the Sixth Circuit before issuing the cessation order which is the subject of our review. By finding that OSMRE took no action until after the Court's decision became final, Judge Miller necessarily rejected Gabriel's estoppel argument as without foundation in fact. The question now before us, therefore, is whether he ruled correctly.

We have recently restated the rules governing our consideration of an estoppel argument. In Enfield Resources, 101 IBLA 120 (1988), and in Cyprus Western Coal Co., 103 IBLA 278 (1988), we outlined the traditional standards invoked by the Board when considering such arguments. In Enfield Resources we explained that

> This Board has well established rules governing our consideration of estoppel issues. We have adopted the elements of estoppel described by the Ninth Circuit Court of Appeals in United States v. Georgia-Pacific Co., [421 F.2d 92, 96 (9th Cir. 1970)] (quoting Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960)). See Ptarmigan Co., 91 IBLA 113, 117 (1986). Estoppel is an extraordinary remedy, especially as it relates to the public lands. Harold E. Woods, 61 IBLA 359, 361 (1982). In addition, estoppel against the Government in matters concerning the public lands must be based upon affirmative misconduct, such as misrepresentation or concealment of material facts. United States v. Ruby Co., 588 F.2d 687, 703-04 (9th Cir. 1978); D. F. Colson, 63 IBLA 221 (1982); Arpee Jones, 61 IBLA 149 (1982). Finally, we have noted that while estoppel may lie where reliance on Governmental statements deprived an individual of a right which he could have acquired, estoppel does not lie where the effect of such action

> would be to grant an individual a right not authorized by law. See Edward L. Ellis, 42 IBLA 66 (1979).

Id. at 124.

Let us apply these standards to this case. The four elements announced by the Georgia-Pacific decision were that the party to be estopped must know the facts, and must intend his conduct be acted upon or must act so as to entitle the party asserting the estoppel to believe it is so intended. The party asserting the estoppel must be ignorant of the facts, and must rely upon the conduct of the party to be estopped to his injury.

First, it is apparent that OSMRE knew the facts, in the sense that at the time of the meeting in Knoxville it was aware that Gabriel had begun mining without a Federal permit on National Forest lands, and knew that the preliminary excavation for a deep mine together with associated disturbances were then present on the Federal lands. This fact is established by OSMRE's letter of January 23, 1981, which declares, referring to Gabriel's deep mine project, that "because this operation is being conducted on Federal (surface) land in the Daniel Boone National Forest, either a determination of valid existing rights or a compatibility finding is required before it may be performed lawfully." 2/

The letter of January 23, 1981, also establishes that OSMRE agreed that Gabriel should stop mining at the site pending litigation of the permit issue. The statement that "[y]our discontinuing the operation and stabilizing the mine site pending the determination of the issues involved and your all-around candor and good faith are both commendable and very much appreciated" summarizes an agreement, as Gabriel contends, that there should be no action taken by either Gabriel or OSMRE prior to the conclusion of the litigation by Gabriel. No other conclusion can be drawn from this statement except that OSMRE intended that Gabriel should rely upon the agreement of the parties to suspend all action on the deep mine until the judicial remedy had been exhausted.

As OSMRE states in the letter of January 23, 1981, and Gabriel explains in its brief, both parties participated in the "stabilizing" of the minesite following their Knoxville meeting. This apparently consisted of repairs to the disturbed area designed to prevent erosion while the litigation was carried out. The minesite was, however, left in an unreclaimed state (which made it subject to citation for the five violations of SMCRA on May 8, 1984). The five violations charged were for failure to eliminate highwalls and construct hollowfill, failure to construct the road and monitor water in conformity to the (state) permit, and failure to maintain a mine sign. Gabriel was not, however, charged with failure to obtain a Federal permit, the question which remained at issue between Gabriel and OSMRE in the Federal litigation which was then still continuing.

2/ A Federal permit would be required because Kentucky has not entered into a cooperative agreement under section 523(c) of SMCRA, 30 U.S.C. | 1273(c) (1982). See Mid-Mountain Mining, Inc. v. OSMRE, 92 IBLA 4 (1986); 30 CFR Part 917.

Faced with this situation, Gabriel relied upon the agreement reached with OSMRE. While Gabriel acknowledged the existence of the unreclaimed minesite found by the OSMRE inspector, it took no action to challenge the NOV, choosing to rely instead upon the agreement with OSMRE to suspend action while the litigation concerning the need for a federal permit was in progress. When Gabriel failed to take action concerning the NOV, it was ignorant of the fact that the NOV would be prosecuted as though it were unrelated to the agreement by the parties to suspend mining while the Federal permit question was litigated.

Although Gabriel has never been cited for mining without a Federal permit, it has been cited for conditions which were the direct result of the agreement it made with OSMRE: the minesite was left unreclaimed, although it was stabilized. This condition of stabilization, however, meant that it was left in a condition so that the operator could return to work, more or less without interruption of the work in progress. This circumstance was of the essence of the agreement with OSMRE, as Gabriel argues, for, if it were not, the stabilization to which the parties agreed, and which was a cooperative venture between OSMRE and Gabriel, would make no sense. This stabilizing was also the direct cause of the conditions for which the NOV was issued.

Finally, this proceeding before the Board now demonstrates that Gabriel was injured by reliance upon the agreement with OSMRE which led to the cessation order under review. Were we to affirm the decision of the Administrative Law Judge under review, Gabriel would be penalized for entering into the agreement with OSMRE to suspend operations pending litigation of the Federal permit dispute, although the apparent reason for the assessment against the company would be failure to reclaim.

The elements to establish estoppel outlined by the Georgia-Pacific Co. decision are, therefore, all present in this case. Gabriel was cited for the existence of conditions caused by the agreement made with OSMRE; conditions for which OSMRE was jointly responsible.

In order to apply the estoppel doctrine against the Government, there must be shown to be some "affirmative misconduct" which requires such action. United States v. Ruby Co., supra. See also Heckler v. Community Health Services of Crawford County, 467 U.S. 51 (1984). (The Government cannot be estopped on the same basis as a private person).

"Affirmative misconduct" has been defined by case-by-case adjudication. Conduct, to qualify as "affirmative misconduct," must be within the scope of the agent's authority and must be an affirmative act which, on a balance of all the equities, amounts to "unconscientious or inequitable behavior." United States v. Georgia-Pacific Co., supra at 97, n.5. Assuming all other elements of estoppel are present, as they are in this case, if the refusal to estop the Government will work an inequitable or unjust result estoppel will lie. See, generally, Davis, Administrative Law Treatise, || 17.01, 17.03, and 17.04 (1982 Supp.).

This factor then, affirmative misconduct, is also present here. In the letter which memorializes the agreement between the operator and OSMRE,

the terms of the agreement are stated in a context which conveys not only the terms of the agreement insofar as the permit dispute is concerned, but also promises continued cooperation and "assistance" from the OSMRE staff while the litigation remained pending. This promise of "assistance" runs contrary to the subsequent inspection and issuance of the NOV which took place in 1984. And it is totally at odds with the fact that the violations for which Gabriel was cited resulted from the stabilization of the minesite cooperatively created by Gabriel and OSMRE.

It appears that, after issuance of the NOV, Gabriel contacted OSMRE. The subsequent amendment of the NOV extending the time for abatement of the violations charged until the permit litigation was completed before the Court of Appeals establishes that something happened. The exact nature of the dealings between the parties is disputed, but both agree that there were negotiations which suspended any enforcement of the NOV while Gabriel's Federal permit litigation proceeded. The fact that Gabriel was ultimately unsuccessful in the permit litigation does not change the fact that the parties agreed to suspend all action until the litigation was completed before pursuing the matter further.

It is significant that Gabriel has never been charged with the Federal permit violation which was originally the only subject of concern. Were it not for Gabriel's failure to obtain a Federal permit, it is clear that the existence of the violations now before us would never have come into existence. OSMRE does not contend that Gabriel was operating in violation of the conditions of the state permit (the five violations now before us) before the Knoxville meeting on January 20, 1981. It seems clear that, except for the failure to obtain a Federal permit, the company's operation was proper. Under the circumstances of this case, we therefore find that it is proper to apply estoppel against OSMRE to prevent the enforcement of this NOV by the cessation order under review, because it would be inequitable and unjust not to do so. See United States v. Georgia-Pacific Co., supra. 3/

There is an additional reason why we should not hesitate in this case to apply principles of estoppel. It is clear we should attempt to foster

3/ While not directly in issue in this case because of the nature of the estoppel remedy applied, we note that in P&K Coal Co. v. OSMRE, 98 IBLA 26 (1987), we indicated that, in the absence of compelling equitable reasons such as exist here, unless an NOV has previously been challenged, it may not be contested in a subsequently issued cessation order. The instant case indicates the infirmity of the approach advocated in P&K, which invoked the doctrine of administrative finality to support the conclusion stated. As this case illustrates, the NOV and the CO are not discrete actions, but rather the one flows into the other. There may be no point in contesting an NOV, from an operator's practical point of view, since it may lead nowhere, especially if it is believed there is no violation. It is only from the vantage point afforded by hindsight that one can clearly see that an NOV should, after all, have been contested. From the point of view of an operator, however, who, like Gabriel, has reason to believe the NOV is simply not correct, it is impossible to predict whether it should be contested.

cooperation between mining operators and OSMRE. Certainly nothing could be more damaging to the spirit of cooperation invoked by OSMRE in its letter of January 23, 1981, than a demonstration that an operator who voluntarily enters into an agreement with OSMRE does so at his peril. It is important that we establish that OSMRE is bound by the agreements which it makes, to the extent that they are enforceable and proper under law.

Clearly, an agreement to do something which the law forbids cannot be enforced, nor can an operator expect by reaching an agreement with OSMRE to obtain a right not authorized by law. Utah Power & Light Co. v. United States, 243 U.S. 389 (1917). The agreement reached by the parties in this case, however, was not prohibited by law.

The mining operation conducted by Gabriel was to have been a deep mine. While it is obviously correct that by agreeing to a cessation of operations, OSMRE allowed the minesite to remain unreclaimed while the question of permitting was being decided, it is also clear that there was never any agreement that reclamation would not ultimately be required either upon the completion of the mining or the termination of litigation, nor was there any agreement that the reclamation standards of SMCRA would not be enforced. The agreement was simply to obtain a court ruling, binding upon both parties, who would then proceed to act upon the result obtained, consistent with the dictates of SMCRA.

The agreement was frustrated before any ruling could be obtained for reasons not explained. Nonetheless, OSMRE does not contend that it was illegal for the agency to enter into the agreement, nor does any provision of law appear to bar the agreement. Since the agreement was not prohibited, it should have been honored by OSMRE. Because it was not so honored, OSMRE was estopped to issue the cessation order based on the very conditions which the agreement necessarily created.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.l, the decision appealed from is reversed and the cessation order is vacated.

Franklin D. Arness
Administrative Judge

I concur:

James L. Burski
Administrative Judge